

The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PRESERVE OUR ISLANDS, et al,

Plaintiffs,

v.

U.S. ARMY CORPS OF ENGINEERS,
et al,

Defendants,

and

NORTHWEST AGGREGATES
COMPANY,

Defendant-Intervenors.

NO. C08-1353-RSM

PLAINTIFFS' MOTION FOR
ATTORNEYS' FEES AND COSTS
PURSUANT TO THE EQUAL
ACCESS TO JUSTICE ACT

**NOTE FOR CONSIDERATION:
OCTOBER 23, 2009**

I. INTRODUCTION

Preserve Our Islands, People for Puget Sound and the Washington Environmental Council ("Plaintiffs") seek an award under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d), in the amount of \$89,650.00 in attorneys' fees and \$3,482.10 in costs for their successful prosecution of this case. Plaintiffs are entitled to the fees they seek in this motion because: (1) Plaintiffs prevailed on their claims that the U.S. Army Corps of

1 Engineers failed to provide a convincing statement of reason to explain why the project's
2 impacts on the environment are insignificant in violation of the National Environmental
3 Policy Act ("NEPA") and that the Corps' and NMFS' informal consultation process for
4 Chinook and orcas was arbitrary and capricious in violation of the Endangered Species
5 Act; (2) Plaintiffs are eligible for an award of fees under EAJA; (3) the government's
6 position was not substantially justified and an award is just; (4) the rates at which Plaintiffs
7 seek a fee award are reasonable and warranted under the standards of governing enhanced
8 rates; and (5) the hours for which the compensation is sought were necessary to the
9 successful prosecution of the case. Each of these points is addressed below.
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11 **II. BACKGROUND**

12 This is an action for declaratory judgment and injunctive relief challenging the U.S.
13 Army Corps of Engineers ("Corps") review and ultimate issuance of a permit allowing for
14 the construction of a large sand and gravel barge-loading facility on the eastern shore of
15 Maury Island, in King County, Washington. Plaintiffs challenged the Corps' issuance of
16 the permits that violated the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*
17 ("NEPA"); Section 7(a)(2) of the Endangered Species Act, 16 U.S.C. § 1536 ("ESA") and
18 Section 10 of the Rivers and Harbors Act, 33 U.S.C. § 403 ("RHA"). This action
19 challenged also the "consultation" process of the National Marine Fisheries Service and
20 U.S. Fish and Wildlife Service for concurring, without undergoing formal consultation,
21 that the project was not likely to adversely affect endangered or threatened species
22 including Puget Sound Chinook and the Southern Resident killer whales.
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24 Plaintiffs filed this action on September 9, 2008. Dkt. #1. An amended complaint
25 was filed on November 19, 2008. Dkt. #10. Plaintiffs filed a motion for a temporary
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1 restraining order (“TRO”) shortly thereafter asking the Court to halt work for the
2 protection of orcas. Dkt. ## 25, 34, 41. The Court denied the requested TRO finding that
3 plaintiffs had not established the requisite likelihood of irreparable harm. *Id.*

4 The parties filed cross-motions for summary judgment based on the administrative
5 record. Dkt. ## 50, 52, 53. On August 13, 2009, this Court issued its Order on Cross
6 Motions for Judgment granting plaintiffs’ motion for summary judgment as to their claims
7 under the ESA and NEPA. Dkt. #58. The Court denied defendants’ cross-motion.
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9 This motion follows.

10 **III. DISCUSSION**

11 **A. Plaintiffs Are Entitled to Attorneys’ Fees and Costs Pursuant to EAJA**

12 Plaintiffs prevailed on their claims under NEPA and the APA. Dkt. #58. Because
13 neither statute contains a citizen suit provision, a party that prevails under these statutes
14 may seek attorneys’ fees, costs, and other expenses pursuant to EAJA. *See Wilderness*
15 *Society v. Babbitt*, 5 F.3d 383, 385 (9th Cir. 1993). A party must prove that it is eligible for
16 fees under EAJA. *Love v. Reilly*, 924 F.2d 1492, 1494 (9th Cir. 1991).
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18 **1. Plaintiffs are eligible under EAJA.**

19 A party is eligible for attorneys’ fees, costs, and other expenses under EAJA if it
20 (1) is a “prevailing party” that (2) incurred costs of litigation against the federal
21 government, and (3) meets applicable size, net worth, or other criteria. 28 U.S.C.
22 § 2412(d)(1)(A), (d)(2)(B).
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24 Plaintiffs satisfy the first criteria for eligibility under EAJA. A party is a
25 “prevailing party” under EAJA if it “succeed[s] on any significant issue in litigation which
26 achieves some of the benefits [it] sought in bringing suit.” *United States v. Real Property*
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1 *Known as 22249 Dolorosa Street*, 190 F.3d 977, 981 (9th Cir. 1999). Plaintiffs obtained a
2 declaratory judgment on their NEPA and APA ESA claims, and injunctive relief, thus
3 surpassing the requirement that they achieve some of the relief sought.

4 Plaintiffs satisfy the second criterion for eligibility: Each incurred the expenses and
5 costs of this litigation against the Corps and NMFS agencies of the United States.
6 28 U.S.C. § 2412(d)(2)(C). Plaintiffs satisfy the third criterion for eligibility: all three
7 plaintiff organizations are conservation groups that satisfy applicable statutory criteria
8 related to nonprofit status, maximum number of employees, or net worth. 28 U.S.C.
9 § 2412(d)(2)(B).¹

- 11 2. An award under EAJA is mandatory because federal defendants’
12 position was not substantially justified and no special circumstances
13 exist.

14 “Once a party’s eligibility has been proven, an award of fees under EAJA is
15 mandatory unless the government’s position is substantially justified or special
16 circumstances exist that make an award unjust.” *Love*, 924 F.2d at 1495. The agency
17 bears the burden of proving that its position was substantially justified. *Oregon Natural*
18 *Resources Council v. Marsh*, 52 F.3d 1485, 1492 (9th Cir. 1995). The agency also bears
19 the burden of proving that any special circumstances make an award unjust. *Love*, 924
20 F.2d at 1495.

- 22 **a. Federal defendants’ positions were not substantially**
23 **justified.**

26 ¹ See Declaration of Amy Carey, ¶ 2 (Preserve Our Islands); Declaration of Joan
27 Crooks, ¶ 2 (Washington Environmental Council); Declaration of Kathy Fletcher, ¶ 2
(People for Puget Sound).

1 To determine if an agency position was substantially justified, the court considers
2 the reasonableness of the underlying government action and the position asserted by the
3 agency in court defending its validity. *Kali v. Bowen*, 854 F.2d 329, 332 (9th Cir. 1988).
4 The fact that the agency's litigation position may be justified is not enough – the court
5 must also consider the underlying agency conduct. *Wilderness Society*, 5 F.3d at 388. A
6 finding that “either the government's underlying conduct or its litigation position was not
7 substantially justified is sufficient to support an award of EAJA fees.” *Cervantez v.*
8 *Sullivan*, 739 F.Supp. 517, 521 (E.D. Cal. 1990); *Commissioner, INS v. Jean*, 496 U.S.
9 154, 158 n.7 (1990) (noting that Congress intended to provide for fees when unjustifiable
10 agency action forces litigation, even when agency tries to avoid liability by reasonable
11 behavior during litigation). Even when some aspects of the agency's position were
12 substantially justified, the court may still find that the agency's overall position was not.
13 *United States v. Marolf*, 277 F.3d 1156, 1164 (9th Cir. 2002) (reversing denial of attorneys'
14 fees, because district court focused solely on agency's litigation position). Here, the
15 federal defendants' position was not substantially justified. *See generally*, Dkt. #58.

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18 **b. No special circumstances make an award unjust.**

19 Plaintiffs are unaware of any special circumstance that might make an award
20 unjust. *Cf. Meinhold v. U.S. Department of Defense*, 123 F.3d 1275, 1277 n.1 (9th Cir.
21 1997) (noting that court considered party's “bad faith” in its fee determination). Federal
22 defendants bear the burden of attempting to establish special circumstances that might
23 make an award unjust. *Love v. Reilly*, 924 F.2d 1492, 1495 (9th Cir. 1991). Federal
24 defendants cannot meet that burden here. For example, the litigation did not include a
25 “close or novel question.” *United States v. Gavilan Joint Cmty. Coll. Dist.*, 849 F.2d 1246,
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1 1249 (9th Cir. 1988); *Bullfrog Films, Inc. v. Wick*, 959 F.2d 782, 785 (9th Cir. 1992) (where
2 the area of law was not “uncharted” an award of attorney’s fees would not be unjust).
3 Here, the legal issues were decided based on well-established law. An award is therefore
4 proper.

5 B. Calculating Hourly Rates under EAJA

6 Since federal defendants’ position was not substantially justified as to the NEPA
7 and ESA claims, the remaining issues in the context of attorneys’ fees are reasonable rates
8 and time.
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10 EAJA provides that a court shall award “reasonable attorney fees” to prevailing
11 parties. 28 U.S.C. § 2412 (d)(2)(A). EAJA sets a base rate of \$125 per hour but provides
12 that a court may award higher rates if it “determines that an increase in the cost of living or
13 a special factor . . . justifies a higher fee.” *Id.* Here, the Court should adjust Plaintiffs’
14 attorneys’ rates to account for the increase in the cost of living since 1996 and also for
15 special factors, including, as EAJA anticipates, “the limited availability of qualified
16 attorneys for the proceedings involved.” *Id.*
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18 First, the Court should adjust upward the hourly rates to account for the cost of
19 living since 1996. The Ninth Circuit calls this adjusted rate the “lodestar” and has
20 approved it as “proper.” *Real Property Known as 22249 Dolorosa Street*, 190 F.3d at
21 984-85. The lodestar is calculated by enhancing the base hourly rate of \$125 under EAJA
22 by the consumer price index for urban consumers for the year in which the fees were
23 earned. *Sorenson v. Mink*, 239 F.3d 1140, 1149 (9th Cir. 2001). The Ninth Circuit has
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1 established that lodestar hourly rates for attorneys within the circuit were \$172.50 in 2008
2 and presumably are \$177.68 in 2009.²

3 Further, the Court should adjust further upward Plaintiffs' attorneys' hourly rates to
4 account for "special factors" present in this case. 28 U.S.C. § 2412(d)(2)(A). To justify an
5 enhancement on this basis, Plaintiffs' attorneys must satisfy three factors: "First, the
6 attorney must possess distinctive knowledge and skills developed through a practice
7 specialty. Secondly, those distinctive skills must be needed in the litigation. Lastly, those
8 skills must not be available elsewhere at the statutory rate." *Love*, 924 F.2d at 1495.
9 Plaintiffs' attorneys meet these criteria.

11 1. Plaintiffs' attorneys possess distinctive knowledge and skills.

12 Plaintiffs' attorneys satisfy the first criterion for enhanced fees. The Ninth Circuit
13 has held that "[e]nvironmental litigation is an identifiable practice specialty that requires
14 distinctive knowledge." *Love*, 924 F.2d at 1496; *Animal Lovers Volunteer Ass'n v.*
15 *Carlucci*, 867 F.2d 1224, 1226 (9th Cir. 1989). Plaintiffs' primary attorney, David S.
16 Mann, has distinct knowledge and skills in the specialized field of federal and state
17 environmental law. Declaration of David S. Mann, ¶¶ 4-7; Declaration of David A.
18 Bricklin, ¶¶ 5-7.
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26 ² Ninth Circuit Notice re: Statutory Maximum Rates under Equal Access to Justice
27 Act (stating no maximum rate for 2009, but the annual rate of increase is roughly 3%).

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2 2. Plaintiffs’ attorneys’ skills were needed in this litigation.

3 Plaintiffs’ attorney satisfies the second criterion for enhanced fees, because his
4 distinctive skills were needed in this case. *National Wildlife Federation v. FERC*, 870
5 F.2d 542, 547 (9th Cir. 1989) (stating criterion and finding that environmental law
6 specialist deserved enhanced fees under EAJA). This litigation involved numerous
7 complex and interrelated issues under NEPA and the ESA based on an extensive and
8 confusing administrative record. Plaintiffs’ state that, in their opinions, counsel’s skills,
9 experience, and understanding were needed to prevail in this case.³

11 3. Plaintiffs’ attorneys’ skills were unavailable at the EAJA base rate.

12 Plaintiffs satisfy the third criterion for enhanced fees, because their attorneys’ skills
13 were unavailable at the EAJA base rate of \$125 an hour. Plaintiffs declare that they were
14 unable to secure qualified counsel who would have taken this case at the base rate.⁴

16 Given that Plaintiffs’ attorneys meet the applicable criteria, the Court should award
17 them enhanced rates for their time spent on the NEPA and APA claims. Once a court
18 determines that attorneys are entitled to enhanced rates under EAJA, it provides that “[t]he
19 amount of fees awarded under this subsection shall be based upon prevailing market rates
20 for the kind and quality of the services furnished” 28 U.S.C. § 2412(d)(2)(A); *see*
21 *National Wildlife Federation*, 870 F.2d at 547 (awarding enhanced rates under EAJA
22 based on market rates charged by attorneys within environmental law specialty). Here,
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25 ³ See Declaration of Amy Carey, ¶ 3; Declaration of Joan Crooks, ¶ 3; Declaration
26 of Kathy Fletcher, ¶ 3.

27 ⁴ See Declaration of Amy Carey, ¶ 4; Declaration of Joan Crooks, ¶ 4; Declaration
28 of Kathy Fletcher, ¶ 4.

1 plaintiffs have established prevailing market rates in the Seattle area for someone of Mr.
2 Mann's experience were \$325 per hour in 2008 and \$350 per hour in 2009. Mann Dec., ¶
3 8-9; Bricklin Dec., ¶ 6. The Court should award all attorneys' enhanced fees under EAJA.

4 C. Calculating Reasonable Hours Under EAJA

5 "The most useful starting point for determining the amount of a reasonable fee is
6 the number of hours reasonably expended on the litigation multiplied by a reasonable
7 hourly rate." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). "By and large, the court
8 should defer to the winning lawyer's professional judgment as to how much time he was
9 required to spend on the case." *Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th
10 Cir. 2008). In successfully prosecuting this case against federal defendants, Plaintiffs'
11 attorneys expended reasonable hours engaged in normal and justified tasks associated with
12 the careful and conscientious prosecution of a lawsuit against an agency that vigorously
13 defended its actions.
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16 Plaintiffs seek recovery for their attorneys as follows:

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|----|---|-------------|
| 17 | 1. Attorney David S. Mann, 59.8 hours at \$325/hour (2008) = | \$19,435.00 |
| 18 | 2. Attorney David S. Mann, 153.7 hours at \$350/hour (2009) = | \$53,795.00 |
| 19 | 3. Attorney Ashley Peck, 32.7 hours at \$200/hour = | \$6,540.00 |
| 20 | 4. Attorney Brendan Donckers, 49.4 hours at \$200/hour = | \$9,880.00 |

21 Declaration of David S. Mann, ¶¶ 2, 12-20; Exs. 1-2.
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23 To document their time, lawyers must "simply list[] and identify the general subject
24 matter of [their] time expenditures" on their timesheets. *Fischer v. SJB P.D. Inc.*, 214 F.3d
25 1115, 1121 (9th Cir. 2000). Plaintiffs' attorneys surpass this test, detailing each task
26 performed on each day they worked on this case. Mann Dec., Ex. 1. Their time begins
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1 shortly after the Corps issued its permit decision in July, 2008, with legal research and
2 drafting of the complaint. *See Webb. v. Board of Educ. of Dyer County, Tenn.*, 471 U.S.
3 234, 243 (1985) (court may award time for developing case, drafting pleadings, and similar
4 matters). Time was reasonably expended in late 2008 attempting to obtain a TRO to try
5 and stop construction while orcas were known to be visiting the area. Mann Dec., ¶ 15.
6 Time was then reasonably expended preparing and responding to cross-motions for
7 summary judgment, oral argument and in preparing this fee petition. Plaintiffs have, in
8 good faith, omitted certain time for either failed claims or duplicate hours. Mann Dec.,
9 ¶ 14. *See, Hensley*, 461 U.S. at 437 (requiring good faith omissions). Given that plaintiffs
10 succeeded on their claims on the merits and obtained significant injunctive relief, its
11 attorneys seek reasonable time in this case.
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13 D. Plaintiffs are Entitled to Recover Costs and Other Expenses
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15 EAJA authorizes an award of “costs” as enumerated at 28 U.S.C. § 1920, 28 U.S.C.
16 § 2412(a)(1), as well as “other expenses.” 28 U.S.C. § 2412(d)(1)(A). Identified “fees and
17 other expenses” include specifically the reasonable expenses of expert witness necessary
18 for the preparation of plaintiffs’ case. Here, Plaintiffs’ seek a total of \$3,482.10 in costs
19 and expenses for prosecuting this case, including for filing fees, service fees and expert
20 witness fees by Dr. David Bain for the preparation of his extensive declaration in support
21 of Plaintiffs’ motion for TRO. Mann Dec., ¶¶ 21-22.
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IV. CONCLUSION

For all the foregoing reasons, plaintiffs respectfully request that the Court award it attorneys' fees of \$89,650.00 and costs and expenses of \$3,482.10.

DATED this 11th day of September, 2009.

Respectfully submitted,

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